Supreme Court, U.S.
FILED
AUG 9 1996
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NO. 95 - 2076

In The

# SUPREME COURT

Of The

# UNITED STATES

October Term, 1996

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**Nelson Fernandes,**

*Petitioner,*

**- vs -**

**Rockaway Township Town Council,**
**Township Engineer,**

**R.V.R.S.A. & Executive Director,**

**E.P.A. & Regional Administrator of Region II,**

**Dorsey and Bell**

**John Dorsey and Joseph Bell**

*Respondents.*

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## REPLY TO BRIEF IN OPPOSITION AND SUPPLEMENTAL BRIEF

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13 pp

## TABLE OF CONTENTS


| | *Page* |
|---|---|
| OPENING STATEMENT | 1 |
| GRANT CONDITIONS NOT AUTHORIZED BY CWA | 1 |
| EPA MEMOS PROVES A CONTINUING VIOLATION | 3 |
| MR HARGROVE'S BAD FAITH & PERJURY | 4 |
| EVIDENCE OF FORBIDDEN PURPOSE | 7 |
| EPA IS LIABLE FOR DAMAGES | 7 |
| RESPONSE TO BRIEF IN OPPOSITION | 8 |


## TABLE OF CITATIONS


| | |
|---|---|
| Accardi v. Shaughnessy, 347 U.S. 260, 266-267 (1953) | 3 |
| Ackley v. West. Conf. of Teamsters, 958 F.2d 1463 (1992) | 4 |
| Antilles Ind., Inc. v. Gov. of V.I., 388 F.Supp. 315 | 5 |
| James B. Beam Dist. Co. v. Georgia, 111 S.Ct. 2439 (1991) | 2 |
| Cape May Greene, Inc. v. Warren, 698 F.2d 179 (3rd.Cir.1983) | 2 |
| Chrysler Corp. v. Superior Dodge, Inc., 83 F.R.D. 179 | 9 |
| Columbus Bd. of Ed. v. Pennick, 443 U.S. 449, 464 (1979) | 7 |
| Doe v. U.S.C.S.C., 483 F.Supp. 539 (D.C.N.Y. 1980) | 7 |
| Golden St. Trans. Corp. v. L.A., 493 U.S. 103, 112 (1989) | 2, 8 |
| Hazel-Atlas Co.v. Hartford Co., 322 U.S. 238, 245 (1943) | 10 |
| Hecker v. Millburn, 538 F.2d 1241, 1245 | 6 |
| Isreal Aircraft Ind. v. Standard Prec., 72 F.R.D. 456 (1976) | 10 |
| Jewett v. Inter. T. & T. Corp., 653 F.2d 89, 93 (3rd. Cir. 1981) | 4 |
| Jett v. Dallas Independent Sch. Dist., 491 U.S. 701, 742 (1968) | 8 |
| Luna v. Beto, 395 F.2d 35, 38 | 6 |
| In re Melting Moments, Inc., Bkrtcy, 21 B.R. 173, 175 | 5 |

## TABLE OF CITATIONS


| | |
|---|---|
| Nudd v. Burrows, 91 U.S.426, 440 (1875) | 9 |
| Oneida Mot. Fr. Inc. v. United Jersey Bank, 848 F.2d 414 (1988) | 9 |
| Pennhurst State School & Hosp. v. Halderman, 451 U.S. at 17 | 7 |
| Pettinaro Const. Co. v. Del.Auth. Reg. Tr., 500 F.Supp. 559 | 3 |
| Purgess v. Sharrock, 33 F.3d 134, 144 (2d.Cir. 1994) | 9 |
| Rueth v. U.S.E.P.A., 13 F.3d 227, 229 (7th.Cir.1993) | 1 |
| Sec. Comm'n v. Chenery Corp., 332 U.S. 194, 202 (1946) | 2 |
| So. Pines Assoc v. U.S., 912 F.2d 713, 715 (4th.Cir.1990) | 1 |
| Springer v. Seamen, 821 F.2d 871 (1st.Cir. 1987) | 3 |
| Texas & Pacific Ry. v. Rigsby, 241 U.S. at 38 (1915) | 8 |
| U.S. v. Leahy, 434 F.2d 7 (1st Cir. 1970) | 3 |
| U.S. v. McKeon, 738 F.2d 26 (2d.Cir.1984) | 9 |
| U.S. v. One Heckler-Koch Rifle, 629 F.2d 1250 | 2, 10 |
| Unpublished Case, 220 Ct. Cl. 605, 611 (4/6/79) | 8 |
| West v. Phil. Elec. Co., 45 F.3d 744, 752 (3rd. Cir. 1995) | 3, 4 |
| WOFAC Corp. v US, 269 F.Supp. 654 (1967) | 3 |


**STATUTES, REGULATIONS & RULES**


| | |
|---|---|
| Clean Water Act (CWA) | 1 |
| FRCP 56(g) | 1 |
| 40 CFR Ch. I, Subpart F, §30.600 (E) | 2, 5 |

## OPENING STATEMENT

I appreciate the Solicitor General and RVRSA waiving their right to respond since Mr. Hargrove's affidavit and 1979 memo, as well as, Mr. Sullivan's memo proves the EPA Administrator for Region II acted without authority of law and contrary to due process. Petitioner thought EPA would admit its use of Mr. Hargrove's affidavit was an error since it appears intentionally filed to violate FRCP 56(g). In the absence of that admission, petitioner wishes to supplement his petition to show that affidavit meets the criteria for perjury in order to prove the district court abused its discretion by relying on that evidence.

## GRANT CONDITIONS NOT AUTHORIZED BY CWA

Petitioner wishes to supplement his petition on the point that the Clean Water Act (CWA) requires EPA to act by order, not by grant condition (Pages 13-14 of petition). Petitioner has since found cases that supports the unambiguous statute that was reviewed. Southern Pines Assoc. by Goldmeier v. U.S., 912 F.2d 713, 715 (4th.Cir.1990) (Administrator can issue an order or bring a civil action). See also; Rueth v. U.S.E.P.A., 13 F.3d 227, 229 (7th.Cir.1993). Southern Pines also found the CWA requires a violation before the EPA can act, which further bars the use of a grant condition. EPA admitted the denial of sewer service was for the express purpose of preventing construction in Cape May Greene @ 186-187, which led that court to find EPA was trying to accomplish matters not included in the CWA. This proves EPA violates the CWA and the holdings of both Cape May Greene and Southern Pines in the case at bar.

The district court's decision also conflicts with the Supreme Court holding that an administrative agency must be equipped to act by general rule (regulation) or by individual order. Securities Comm'n v. Chenery Corp., 332 U.S. 194, 202 (1946). This holding is pertinent since the EPA violated regulation 40 CFR Ch. I, Subpart F, §30.600 (E) as was pointed out to the district court in petitioner's brief [1] and by proceeding by grant condition contrary to a statute that requires action by order.

Petitioner previously showed the district court disregarded the holdings of Cape May Greene, Inc. v. Warren, 698 F.2d 179 (3rd.Cir.1983). That case found a denial of sewer service was not authorized by the CWA, which creates an implied right to sewer service. [2] Since that holding precedes EPA imposing the same condition on the RVRSA, the district court abused its discretion by disregarding a legal ruling antedate to the grant condition that affects petitioner. [3] Therefore, the district court abused its discretion by disregarding allegations and case law that was before it, making its decision arbitrary and irrational. West v. Phil. Elec. Co., 45 F.3d 744, 752 (3rd. Cir. 1995).

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[1] Admissions in brief of party opposing motion for summary judgment are funtionally equivelant admissions on file and, as such, may be used in determining presence of a genuine issue of material fact. U.S. v. One Heckler-Koch Rifle, 629 F.2d 1250.

[2] Golden State Transit Corp. v. Los Angeles, 493 U.S. 103, 112 (1989) (Violation of a federal right that has been found to be implicit in a statute's language is a direct violation of the right as though it were set forth in the text of the statute.)

[3] James B. Beam Distilling Co. v. Georgia, 111 S.Ct. 2439 (1991) (court applies legal rules already decided antedate the events on which the dispute turns).

## EPA MEMOS PROVE A CONTINUING VIOLATION

The district court had sufficient evidence that the EPA imposed a grant condition without any authority of law based on the holdings of Cape May Greene and the memos [4] of Mr. Hargrove and Mr. Sullivan. The court overlooked these material facts. Pettinaro Const. Co. v. Del.Auth. Reg. Tr., 500 F.Supp. 559. Mr. Hargrove's memo shows an absence of federal law to support the condition and clear reliance on contract law. While, Mr. Sillivan's memo requires enforcement of the condition by negotiating a denial of due process with the state. [5] These memos and the terms of the grant condition support the application of a continuing violation theory since it establishes the fact that the EPA was following **a pattern and practice of discrimination extending into the statutory** . . [limitations] **period."** Jewett v. Inter. Tel. & Tel. Corp., 653 F.2d 89, 93 (3rd. Cir. 1981); West v. Phil. Elec. Co., 45 F.3d 744, 752, 754 (3rd. Cir. 1995). Therefore, the district court's refusal to apply a continuing violation theory was an abuse of discretion and faulty. Ackley v. Western Conference of Teamsters, 958 F.2d 1463 (1992). (Evidence that proves the district court findings were erroneous warrants reversal).

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[4] WOFAC Corp. v US, 269 F.Supp. 654 (1967) (Documentary exhibits would constitute matrices of opinion in lieu of findings of fact.)

[5] Accardi v.Shaughnessy, 347 U.S. 260, 266-267 (1953); United States v. Leahy, 434 F.2d 7 (1st Cir. 1970); Springer v. Seamen, 821 F.2d 871 (1st.Cir. 1987).

## MR HARGROVE'S BAD FAITH & PERJURY

The following comparison of Mr. Hargrove's affidavit as compared to his 1979 memo as previously submitted, shows that he committed perjury as petitioner claimed, since his 1979 memo fails to present statutory authority, regulation, case law or facts that could support a reasonable belief to support his affidavit. That affidavit must go to the issue of his belief and knowledge in 1979, since his actions at that time are at issue in this case.

EPA claims the CWA as its sole authority to impose grant conditions. Mr. Hargrove's certification states, "**Protection of these areas is mandated by federal statutes, regulations, and policies.**" However, his 1979 memo that led to the grant condition (App. K, p.48) states: "**Protection of environmentally sensitive areas is mandated by Federal policy.**" There was no reliance on statute or regulation in 1979 when the grant condition was instituted. In fact, his certification and his 1979 memo fails to present any authority of law, or any construction of federal authority [6] to support a reasonable belief to avoid perjury. This proves his condition was arbitrary and capricious.[7] Mr. Hargrove's certification claims it is supported by regulation, which is refuted by 40 CFR Ch. I, Subpart F, §30.600 (E), a regulation that imposed an affirmative duty to provide the benefit of the program to any person, which was not refuted.

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[6] A claim is not in bad faith if it has some legal and factual support, considered in light of reasonable belief of individual making claim. In re Melting Moments, Inc., Bkrtcy, 21 B.R. 173, 175

[7] 'Administrative action is "**arbitrary**" if it is taken without **any authority of law or upon a misconstruction of the statutory authority** under which it purports to be taken. Antilles Industries, Inc. v. Gov. of Vir. Is., 388 F.Supp. 315, 321, (D.C.Vir.Isl.).

Mr. Hargrove's 1979 memo also contains passages that prove he did not rely on the CWA by using the word ***"theoretically"*** in the following, which Webster's ninth collegiate dictionary defines to mean ***"confined to theory or speculation"***:

> **"since passage of the Clean Water Act, most of the design and construction of wastewater treatment facilities are financed by Federal grants. The remainder comes from state grants and bond issues which are recovered through user charges. Theoretically, facilities built using such financial backing could limit sewer hook-ups."**

Mr. Hargrove's speculates instead of presenting law and facts, thus proving he lacked a basis for a reasonable belief before recommending the denial of a public benefit. His actions in 1979 also violates the regulation that specifically requires service be provided to any person, thus proving his memo and affidavit to be recklessly given for the purpose of misleading the court, [8] and to deny petitioner his clear legal rights. [9]

Other comments in his 1979 memo that prove he was conducting himself in a reckless fashion, include:

> **"The question of allowing hook-ups rests with both the authority and the municipalities. The authority is free to reasonably fix the terms and conditions of service.**

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[8] Perjury is giving an affidavit recklessly for the purpose of having it believed. Com. v. Leitch, 137 A.2d 909, 912.

[9] "Bad faith" may be demonstrated in the conduct which necessitated the action or in the conduct occurring during the course of the litigation; bad faith may be demonstrated by showing that a defendant's obstancy in granting a plaintiff his clear legal rights. Hecker v. Millburn, 538 F.2d 1241, 1245.

It implies the right to impose the grant condition contrary to the EPA regulation. Another comment by him, says:

> **"State law does give to the authority the ability to enter into contracts. These contracts are primarily with municipalities for sewage collection and disposal. It seems to *imply* that they can also enter into contracts with EPA through grant agreements. These contracts stand on the same footing as contracts between natural persons or municipalities."** (emphasis added)

Mr. Hargrove relies on a construction of state law as giving a sewer authority the right to accept grant conditions, rather then providing preemptive federal authority to establish a statutory mandate. No statutory or regulatory authority was ever presented to support his belief. [10] Since Mr. Hargrove was a Soil Conservationist, his ***opinion*** on the law could not be considered what Webster's ninth collegiate dictionary defines ***as advise by expert*** in order for the EPA to rely on that ***opinion*** in support of a policy to override a federal regulation. Therefore, his affidavit was tendered in bad faith in order to achieve summary judgment, thus avoiding a trial on the merits.

The regional administrator relied on these memos to impose grant condition 4(b) though they fail to present federal authority and violate due process. Hence, administrator violated the holding that **"[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."** Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. at 17.

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[10] "Perjury" is the willful assertion as to a matter of fact, opinion, belief, or knowledge, made by a witness in judicial proceeding upon oath and such assertion is material to the issue of inquiry and known to such witness to be false. Luna v. Beto, 395 F.2d 35, 38.

## EVIDENCE OF FORBIDDEN PURPOSE

Mr. Hargrove's 1979 memo evinces a forbidden purpose. Furthermore, Mr. Sullivan's implementing the grant condition by negotiating a denial of due process with the state provides additional evidence of that forbidden purpose. Doe v. U.S.C.S.C., 483 F.Supp. 539 (D.C.N.Y. 1980).

Mr. Hargrove's memo reviewed a N.J. regulation that prevents building a septic system on a lot that is within 100' of a sewer line. Therefore, Mr. Hargrove was fully aware that denying sewer service would prevent all construction, proving an intent to take private property by deceptive means in order to avoid paying compensation. The grant condition created an anomaly that interferes with a regulation intended to protect the public by creating a condition precedent that was conceived to improve the protection of public health, not to deny fundamental property rights. Therefore, Mr. Hargrove foresaw that his condition would prevent development contrary to the intent of the state regulation, which is relevant evidence to prove the ultimate fact, forbidden purpose. Columbus Board of Education v. Pennick, 443 U.S. 449, 464 (1979).

## EPA IS LIABLE FOR DAMAGES

The Court of Claims held that a denial of sewer service or an interference with the right to contract for sewer services was a taking. It was part of its holdings in a matter involving a federal grant provided in support of the CWA. Unpublished Case, 220 Ct. Cl. 605, 611 (4/6/79). A grant that both protects the waters of this country while

providing a benefit to the public in the form of sewer services. Golden State Transit Corp. v. Los Angeles, 493 U.S. 103, 112 (1989) (Violation of a federal right that has been found to be implicit in a statute's language is a direct violation of the right as though it were set forth in the text of the statute.)

Therefore, EPA's efforts to deny the benefit to those entitled to receive it, violates the holding that:

> **"A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law."** Texas & Pacific Ry. v. Rigsby, 241 U.S. at 38 (1915); Jett v. Dallas Independent School Dist., 491 U.S. 701, 742 (1968)

## RESPONSE TO BRIEF IN OPPOSITION

Respondents brief in opposition argues that petitioner presented issues that were decided in an earlier petition. The respondents position is subject to judicial estoppel, [11] since Mr. Cabana now argues a position contrary to the one he took in the former case, on page 15 of that brief, to-wit:

> **"Petitioner now raises a jurisdictional claim under 42 U.S.C § 2000d, a claim that was not raised before the state courts."**

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[11] Judicial estoppel precludes a party from assuming a position in a legal proceeding inconsistent with one previously asserted. Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414 (3rd.Cir.1988)

The respondent now claims this issue was decided though he originally claimed that it was never raised.

As to Mr. Bell's fraud, Mr. Cabana formerly claimed:

> **"Petitioner fails to set forth any error committed by the state courts in their determination which would indicate a result being repugnant to the Constitution or any law of the United States or New Jersey."**

He now claims the fraud was reviewed, having claimed that it was not shown to be a court error. Their defense requires a judicial estoppel since they now claim the flip side of the same argument that was formerly presented.

Since fraud destroys the validity of any judgment, [12] it provides grounds for relief in accordance with Rule 60(b). [13] Therefore, petitioner filed this action seeking relief from that judgment by proving Mr. Bell's fraud can be used to bar res judicata. Purgess v. Sharrock, 33 F.3d 134, 144 (2d.Cir.1994); U.S. v. McKeon, 738 F.2d 26 (2d.Cir.1984). The court having erred by overlooking Mr. Bell's fraud before Judge Harper.

The respondents do not refute the events, the order of their occurrence, the evidence that is admissible at trial, or the allegations in the petition, thus leaving these matters in tact for this Court's review. Their former argument even admits Mr. Bell's fraud was never considered in the former case. [14]

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[12] Nudd v. Burrows, 91 U.S. 426, 440 (1875)

[13] "And in cases where courts have exercised the power, the relief granted has taken several forms: setting aside the judgment to permit a new trial, altering the terms of the judgment, **or restraining the beneficiaries of the judgment from taking any benefit whatever from it.** Hazel-Atlas Co.v. Hartford Co., 322 U.S. 238, 245 (1943).

[14] Chrysler Corp. v. Superior Dodge, Inc., 83 F.R.D. 179

Respondents review the case history and the district court opinion to dissuade you from reviewing the allegation that [15] Mr. Bell withheld material facts of personal knowledge from petitioner and the court. [16] He later admits the town's fraud and his knowledge of it to a different judge, but never disclosed his misrepresentation to the former judge

Dismissing Rockaway from the case would be inappropriate since ordinance § 54-100L continues to violate the same federal regulation violated by the other defendants. Furthermore, Mr. Bell's fraud was in support of a policy to sell lots affected by EPA's violation, which resulted in a scheme to injure a different segment of the public because of the loss in revenue that resulted. To disregard Mr. Bell's admission of the town's fraud after obtaining a bar of limitations by fraudulent means only undermines the legal process and petitioner's right to rely on a fair hearing.

Respectfully submitted,

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(D.C.Md. 1979) (A fraud that was considered in the judgment assailed bars action under Rule 60 (b))

[15] Admissions in brief of party opposing motion for summary judgment are funtionally equivelant admissions on file and, as such, may be used in determining presence of a genuine issue of material fact. U.S. v. One Heckler-Koch Rifle, 629 F.2d 1250.

[16] "knowingly and fraudulently withheld from the defendant's, the court and the jury, matters material to the fair disposition of claims presented in this lawsuit **which were known by no one but themselves.** This constituted a serious interference with the judicial process" Isreal Aircraft Industries v. Standard Precision, 72 F.R.D. 456, 463 (1976).